IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.388 OF 2001

1. United Mine Workers Union,
   a trade union duly registered
   under the Trade Unions Act, 1926
   having its office at Tisk,
   Ponda, Goa;

2. Shri Vithal A. Sawant,
   major of age,
   resident of House No.E/31,
   Ekta Nagar Colony,
   Mapusa, Goa..... PETITIONERS.

VERSUS

1. Union of India,
   represented through
   Secretary for Labour,
   Government of India,
   Central Secretariat,
   New Delhi;

2. Assistant Labour
   Commissioner(Central),
   having his office at
   Municipal Building,
   Vasco-da-Gama, Goa;

3. M/s V.M. Salgaoncar &
   Bros. Ltd., a company
   incorporated under the
   Companies Act,1956, having
   its registered office at
   Salgaocar House,
   Vasco-da-Gama, Goa.....RESPONDENTS.

Shri A.V. Nigalye, Advocate for the Petitioners.

Shri Joseph Vaz, Additional Central Government Standing Counsel, for Respondents No.1 and 2.

Shri M.S. Bandodkar, Advocate for the Respondent NO.3.

CORAM : A.S. AGUIAR,J.

DATED : MARCH 28, 2002.

ORAL JUDGMENT

Issue Rule, returnable forthwith.

2. Heard the learned Advocates.

3. By this Writ Petition, the Petitioners seek withdrawal of letter dated 1-8-2001 of the Under Secretary, Government of India, Ministry of Labour, communicating the decision of the Central Government refusing to refer the industrial dispute relating to the dismissal of Petitioner No.2 from service,for adjudication and for a direction to Respondent No.1 to refer the said dispute relating to dismissal of Petitioner No.2 from service for adjudication by the Central Government Industrial Tribunal.

4. The short question which falls for consideration is whether the appropriate Government was justified in refusing to refer the industrial dispute relating to the dismissal of Petitioner No.2 from service for adjudication to the Industrial Tribunal/Labour Court under

Section 10 of the Industrial Disputes Act, 1947.

5. It is the case of the Petitioner No.2 that he was in the employment of Respondent No.3 at its benefication plant at Vagus, Goa, being designated Mines Foreman and was performing duties of a workman with Respondent No.3.

6. Petitioner No.2 was served the charge-sheet dated 21-4-1997 alleging that on 6-4-1997 he entered the cabin of the Assistant Manager, had altercations and arguments with his immediate superior and threatened, abused and assaulted him. The imputation against him was of misconduct under the Certified Standing Orders of Respondent No.3. The second Petitioner was charged with having committed misconduct specified in the relevant clauses of the said Certified Standing Orders. Copy of the charge-sheet dated 21-4-1997 is at Exhibit P-1.

7. A domestic enquiry was held against the Petitioner by Enquiry Officer appointed by third Respondent. The Petitioner contended before the Enquiry Officer that the enquiry was not fair and proper and was held in violation of the principles of natural justice.

The Enquiry Officer submitted his findings on 18-8-2000 to Respondent No.3 holding the charges alleged against the Petitioner No.2 as proved.

8. On 21-11-2000, Petitioner No.2 was issued Show Cause Notice stating that the findings of the Enquiry Officer were accepted and calling upon him to show cause as to why he should not be dismissed from service. Petitioner No.2 filed his reply to the Show Cause Notice. By letter dated 23-12-2000 Respondent No.3 dismissed the second Petitioner from service with immediate effect. The dismissal letter is at Exhibit P-2.

9. On receipt of the dismissal order, the first Petitioner, i.e. the United Mine Workers Union, raised an industrial dispute demanding that the Petitioner No.2 be reinstated in service with full back wages and continued in service. The first Petitioner Union also sought assistance of the Assistant Labour Commissioner (Central) in the dispute. The Assistant Labour Commissioner (Central) in his capacity as the Conciliation Officer appointed under Section 4 of the Industrial Disputes Act, 1947, issued notices to the parties and held discussions and

conciliation proceedings in the dispute. It is contended on behalf of Respondent No.3 in the said proceedings that Petitioner No.2 was not a workman within the meaning of Section 2(s) of the Industrial Disputes Act, 1947, which contention was disputed by the Petitioner. Since no settlement could be reached, the conciliation proceedings ended in failure. Thereupon, the Assistant Labour Commissioner submitted his Failure Report of the Conciliation Proceedings dated 27-4-2001 to the Central Government as required under Section 12(4) of the said Act. The Petitioner No.1 by letter dated 10-8-2001 signed by the Under Secretary, Government of India, Ministry of Labour, was informed that the Ministry of Labour (Central Government) does not consider the dispute fit for adjudication for the following reason:

> "It is reported that Shri Vithal Sawant in respect of whom the dispute was raised was not a workman as per Section 2(s) of the I.D. Act, 1947."

10. The said letter dated 1-8-2001 is at Exhibit P-4. The said decision of the Central Government refusing to refer the dispute for adjudication communicated to the Petitioners by letter dated 1-8-2001 is challenged, inter alia, on the grounds that the Government has sought to adjudicate and decide the dispute which is the function of the Industrial Tribunal. The said action is, therefore, without jurisdiction and is in excess of the powers conferred on it by the Industrial Disputes Act, 1947. Further that there was no material before the Government to come to the conclusion that the Petitioner was not a workman.

11. It is well settled that the question whether a person is a workman or not cannot be decided by the Referring Authority, namely, the Central Government. That is the function of the competent Industrial Tribunal. Hence in refusing to make the reference on the ground that the Petitioner is not a workman, the Respondent No.1 has clearly acted without jurisdiction. Reference may be made to the case of **Leena Patade (Smt) v. Union of India, Ministry of Labour & others** (2002 I CLR 778), wherein this High Court relied upon the judgment

of the Division Bench of the Gujarat High Court in **N.D.D. B. Employees Union v. State of Gujarat and Ors.** [1992(1) LLJ 725] wherein M.B. Shah, J. as he then was, speaking for the Bench, had observed:

> "Under Section 10(1), the Government of the concerned authority can prima facie decide from the evidence whether the person raising the industrial dispute is a 'workman' within the definition of S.2(s) of the Industrial Disputes Act. Consideration of prima facie evidence would not empower the Government to adjudicate the dispute either on law or facts and decide it finally. But from the record, if it is apparent without any detailed investigation that the person raising the industrial dispute is not a "workman" as defined in section 2(s) then the Government is not entitled to make a reference by assigning reasons for doing so as provided under S.12(5) of the Act."

and held:

> "It is apparent from the above observations that where a detailed investigation is necessary to determine whether the person raising the industrial dispute is a workman as defined under S.2(s) of the Act, then the Government will make a reference under section

10 of the said Act. The reasons given by the Government would show that the Government came to the conclusion that there is no convincing evidence that the petitioner is a "workman" within the meaning of section 2(s). It would further appear that the Government was satisfied that the petitioner was getting all the benefits available to an officer of the bank. All these relevant and vital aspects have to be examined by the Industrial Tribunal while adjudicating upon the reference made to it. In our opinion, the reasons given by the Government would tantamount to adjudication which is impermissible. That is the function of the Tribunal and the Government cannot arrogate to itself that function. In **State of Bombay v. K.P. Krishnan** Air 1960 SC 1223 which was confirmed in **Bombay Union of Journalists v. The State of Bombay** AIR 1964 SC 1617 it was observed:

> " From the perusal of these two decisions it becomes clear that the ambit of the enquiry open for the Government or the Dy. Commissioner u/s. 12(5) of the Act is very limited. The Government has only to consider whether there is a prima facie case or merit and it is not permissible to adjudicate on the merits of the claim raised by the employee. Instead, the Government or the Dy. Commissioner of Labour should be very slow in declining to make the reference because such an action would shut the doors for an employee to get this dispute adjudicated by the Labour Court. The Legislature has enacted the Industrial

> Disputes Act with the fervent hope that the disputes between the employee and the employer would be decided expeditiously and the substantial right conferred on the employee to get his dispute adjudicated from the Court should not be defeated by the Dy. Commissioner of Labour or the Government by adjudicating that the action of the Management is justified."

12. In the present Petition, it is the specific case of Petitioner No.2 that though designated as Mines Foreman, he was performing duties of a workman with Respondent No.3 and that there was no material before the Government to come to the conclusion that the Petitioner No.2 was not a workman. Respondent No.1 could not have decided the question whether the Petitioner was a workman or not. It is only the competent Industrial Tribunal that could decide whether the Petitioner No.2 was a workman or not. Hence in refusing to make the reference on the ground that the Petitioner is not a workman, the Respondent NO.2 has clearly acted without jurisdiction.

13. In view of the above, Rule made absolute in terms of prayers (a) and (b) of the Petition. All issues that may be taken before the Central Government Industrial Tribunal are

kept open.

Petition stands disposed of.

(A.S. AGUIAR)
JUDGE.

ac.